United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-7289

75-7289

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-7289

BERNARD FRIED,

Plaintiff-Appellant

- against -

ROBERT O. LOWERY, ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT
and
APPENDIX

BERNARD FRIED
Plaintiff pro se
88-11 Elmhurst Avenue
Elmhurst, New York ,11373
for plaintiff-appellant

Dated: August 27 , 1975

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UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 75-7289

BERNARD FRIED,

Plaintiff-Appellant,

- against -

ROBERT O. LOWERY, et al.,

Defendants-Appellees

On Appeal from the United States District Court
For the **Eastern** District of New York

BRIEF FOR PLAINTIFF- APPELLANT

BERNARD FRIED
88-11 Elmhurst Avenue
Elmhurst, New York, 11373
Plaintiff-Appellant pro se

Dated: August 27 , 1975

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Point 3	Plaintiff has a Right to equal protection under the law, as well as the Right to expect the Judicial Notice should be taken by the Judiciary, of the infraction of an administrative Code, by defendants, for the deliberate purpose of prejudicing the rights of the plaintiff; plaintiff has a further right to expect that the Judiciary should take Judicial Notice of a conflict between Federal and State Law, and that Rule 35(a) USCA, Federal Rules of Civil Procedure supersedes that of Section B3-39.0, of the New York City Administrative Code, and that Rule 35(a) bars the psychiatric examination of a party under governmental control, without a Court Order after good cause having been shown.	21/22

Conclusion

The Order appealed from should be reversed, upon the issues herein presented, and upon the non-conformance of the proposed Order for submission to the Court, with the Order actually submitted and signed, and upon the mitigating circumstance due to the improperly constructed posted calendar, which caused the plaintiff, a layman, to misread the time of the call thereon, and for the fact that the Court refused to accept the apology of the defendant nor entertain an oral motion for a re-hearing of the matter, such motion being made in the presence of only one of the attorneys for defendants, the other attorney being absent at the same calendar call, and said motion having been made within one (1) hour after the call and prior to the lunch hour recess, and the Motions made by defendant should be granted in their entirety, or such other and further relief as the Court deems proper and just.

To be argued by
appellant pro se

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BERNARD FRIED,

Plaintiff-Appellant

Docket No. 75-7289

- against -

ROBERT O. LOWERY, et al.,

Defendants-Appellees

APPELLANT'S BRIEF

Statement of Issues

1. Did the First and Fourteenth Amendments to the Constitution of the United States give the plaintiff a Constitutional Right to an evidentiary hearing in order to determine whether the defendants did falsely and wrongfully damage the reputation of the plaintiff, through their entering into a collusive conspiracy, to remove the plaintiff from his position as a Supervising Fire Alarm Dispatcher, in the Fire Department of the City of New York, and for collusion to suppress information for purpose of obstruction of justice with respect to the said removal.

2. Did New York laws give the plaintiff a property right in continuation of his employment, to which Federal Constitutional due process procedures applied, and entitled him to a hearing and to a Court directed Order for a medical examination, upon good cause having been shown, in accordance with Rule 35(a), Title 28, USCA.

3. Did the plaintiff have a Constitutional Right, to evidentiary hearings, before he could be disqualified, and before he could be directed for a medical examination under duress, at such time when such examination was intended , to stigmatize the plaintiff, and forcibly retire the plaintiff on an ordinary disability, and at such time when a question of an on the job injury was being determined, and, before he could be deprived of his rightful position as a Fire Alarm Dispatcher.

4. Did the plaintiff have a Constitutional Right, to expect Judicial Notice to be taken, of a deliberate violation of State Law, by a governmental agency, for the sole purpose of stigmatizing the plaintiff, defrauding the plaintiff, and depriving the plaintiff of his rightful claimto his position as a Supervising Fire Alarm Dispatcher; Did the plaintiff have a Constitutional Right, to expect Judicial Notice to be taken, of a possible conflict between Federal and State Law, in the difference existing between Rule 35(a) USCA, and Section B3-39.0, of the New York City Administrative Code, at such time when the application of the latter, permits the stigmatizing of the plaintiff by permitting the plaintiff to be directed for a medical examination without evidentiary hearings having been held first.

STATEMENT OF THE CASE

This is an action started by a Supervising Fire Alarm Dispatcher, a civilian title within the New York City Fire Department, under the Federal Civil Rights Law (42 U.S.C.§1983), against the Fire Department, City of New York, The New York City Employees' Retirement System, Queens General Hospital, Board of Estimate, Corporation Counsel, City of New York, Spreme Court, State of New York, County Clerk, County of New York, and upon an amended Complaint with Supplemental Summonses for a total of 41 defendants, all but 2, being employees of the City of New York, for a declaratory judgment, that the defendants unconstitutionally deprived the plaintiff of his rights, under the Constitution of the United States, by terminating his employment, without written reasons and an opportunity to challenge such reasons, if any, at an evidentiary hearing, by means of obtaining false medical information, through a collusive conspiracy, for the purpose of retiring the plaintiff on an ordinary medical disability, under Section B-3-39.0, of the New York City Administrative Code, and by the violation of the said code by the defendants, for the sole purpose of stigmatizing, defrauding, and depriving plaintiff, of his rightful claim to his position of Supervising Fire Alarm Dispatcher; for the suppression of information beneficial to the plaintiff and the dissemination of information detrimental and prejudicial to the plaintiff; for the denial the plaintiff of justice by the judiciary of the Supreme Court State of New York.

The Complaint seeks equitable relief from such UnConstitutional actions, by cancellation thereof and the re-instatement of the plaintiff to his position of Supervising Fire Alarm Dispatcher, with adjustment of moneys for losses sustained by the plaintiff, or in the alternative, for compensatory damages in the sum of $1,000,000.00.

COURSE OF PROCEEDINGS

The Summons and Complaint was served upon the defendants as is shown by the executed summons which was filed by the united states Marshal on March 20, 1974.

Defendants never served an Answer to the Complaint. On March 13, 1974, defendants filed a Notice of Motion to dismiss the complaint, along with a memorandum on law, by the Attorney General State of New York on behalf of Judiciary of the State of New York,and County Clerk, County of New York

On March 11, 1974, Defendants, by the Corporation Counsel,City of New York, filed a Notice of Motion to dismiss the Complaint except for the judiciary, which included the defense of Res Judicata. Queens General Hospital was also excluded.

On Apri 10, 1974, Plaintiff filed a Notice of Motion to bar the Corporation Counsel from interposing any defense, on the grounds of conflict of interest, and that a corporate entity is barred from representing itself under the CPLR of the State of New York; to find the defendants in default for failing to produce the information requested in the Complaint; an affidavit in opposition to dismiss the complaint was also filed

On July 19, 1974, Case was argued before the Hon. Thomas C. Platt, J.D.C.; the Attorney General State of New York, failed to make an appearance. Corporation Counsel and plaintiff pro se present; the decision on all motions was reserved.

On October 2[illegible], 1974, an Order and Memorandum was filed by the Court, dismissing the Complaint with leave to file an Amended Complaint; the memorandum cited the issue of res judicata which had been raised by the defendants and the case of Lombard v. Board of Education, and strongly urged the representation of plaintiff by an attorney.

No decisions were rendered on plaintiff's Motions.

On December 16, 1974, with apologies to the Court for his inability to obtain counsel without fee, filed pro se an Amended Complaint, and Supplemental Summonses, were issued.

On January 8, 1975, a Notice of Motion to dismiss the amended Complaint, was filed by the Attorney General State of New York, on behalf of judiciary and County Clerk, citing judicial immunity from prosecution.

On January 10, 1975, plaintiff filed a Notice of Motion to bar and enjoin the Attorney General State of New York, from interposing any pleadings on behalf of defendants, on the grounds of conflict of interest and lack of jurisdiction, in that the attorney General could not defend anyone who it is alleged violated the Constitutional Rights of a party, and that all courts in all counties comprising the city of New York, were under the jurisdiction of the City of New York, that would include the County Clerk, and that failing to provide counsel for the injured party, in itself constituted an unconstitutional act, failing to provide equal protection under the law.

On January 10, 1975, an ex parte Order was issued extending the time for defendants to to answer the Complaint.

On January 17, 1975, executed summonses filed by U.S.Marshal. January 24, 1975, Plaintiff filed an Affidavit in opposition

January 24, 1975, defendants by the Attorney General State of New York, filed an Affidavit in Opposition to plaintiff's motion

January 24, case called and adjourned to January 31, 1975.

January 31. 1975, case called, present Attorney General State of New York for defendants, and plaintiff pro se.

Decision reserved on plaintiff's Motion to bar and enjoin.

Decision reserved on Motion to dismiss. Minutes of hearing do not reflect any such contemplation by Judge Platt.

February 14, 1975, Notice of Motion to dismiss complaint filed by defendants, by Corporation Counsel, along with memorandum on law.

March 3, 1975, plaintiff's request for admissions and request for production of records filed.

March 17, 1975, plaintiff's affidavit in opposition to defendants motion to dismiss, filed , along with memorandum on law.

March 17, 1975, plaintiff's Affidavit in opposition to ex parte by defendants, of order to extend time for the submission and production, filed.

March 21, 1975, Order dated March 17, 1975, extending the time for production and admissions for 30 days after hearing of motio n to dismiss the complaint.

March 21, 1975, Case called, case dismissed on defendant's motion submit order.

March 21, 1975 Minutes of hearing indicate that plaintiff due to extenuating and mitigating circumstances, was not present at

the time of the calendar call, due to the Court posted calendar having been so constructed as to allow room for error, in the reading of it especially by a layman; that plaintiff was in the Courtroom, within the hour of the call, along with the attorney for defendants and before Court was adjourned for lunch ; that Mr. Justice Platt refused to accept any apologies or entertain plaintiff's request for a rehearing on the motions.

April 2, 1975, plaintiff received a proposed Order to be submitted by defendants. (page 26-23)

April 14, 1975, an Order signed and filed by the Court was found by plaintiff not to conform to the proposed Order neither, in type construction, nor intent. (please see pages 54 through 56(a)

Plaintiff had intended to show the Court that defendant in their pleadings submitted a copy of an Article 78 Petition filed by plaintiff in the Supreme Court State of New York, to vacate the decision of the Article 78 Petition of 1969, on the basis of fraud, without any comments thereon, with the intent to lull the Court into complacency.

The proposed Order submitted to plaintiff also had thatsame intentevidently.

On July 2, 1975, the said Article 78 Petition was denied, is now under appeal, and again makes a farce of the justice system in the State of New York.

On May 9, 1975, Notice of Appeal was filed.

On May 15, 1975, Transcript was filed

On May 16. plaintiff made a Motion for Assignement of Counsel

On June 18, 1975, plaintiff's Motion was denied.

July 1975, plaintiff requested extension of time for the possibility of obtaining Mr. Nathan Dechter as counsel

July 15, 1975, Request granted to September 2, 1975

July 10, 1975 Motion in Eastern District Court for a rehearing of the matter with Mr. Dechter as counsel, returnable on July 18, 1975.

July 17, 1975, Application at the District Court, for an enlargement of time, on the grounds that Mr. Dechter, counsel, was admitted, critically ill to Beth Israel Medical Center, application granted to August 29, 1975.

August 20, Plaintiff attempting to perfect appeal pro se, for the reason that Mr. Dechter still in Beth Israel Medical Center, and unable to assume any legal burdens, especially without fee.

Plaintiff-appellant respectfully directs the attention of the Court to the following exhibits:

1. Copy of Court Posted calendar for March 21, 1975, with emphasis thereon supplied. (page 24)

2. Copy of porposed Order as received by the plaintiff on April 2, 1975. (page 26-28)

3. Copy of envelope indicating post mark date. (30)

4. Copy of letter from Beth Israel Medical Center showing date and diagnosis as well as incorrect length of time expected to stay at hospital. (page 32)

Exhibits continued:

5. Lombard v. Board of Education Decision
(pages 34-46)

The Facts

In 1953, plaintiff-appellant was appointed from a duly promulgated competitive list, to the title of Fire Alarm Dispatcher, a civilian title in the Fire Department.

From the time of his appointment plaintiff was met with opposition .

Because plaintiff's honesty, morality and ability could not be questioned, he was able to overcome the numerous obstacles placed in his way by his superiors.

There had been friction between the civilian and uniformed firemen working out of title in this position, dating back to the latter part of the 19th century, at which time the position was adjudged by the Court of the City of Brooklyn, to be a civilian title.

Plaintiff because of his honesty, refused to participate in an accepted practice of granting time off to the personnel and falsely marking them with time worked.

Plaintiff because of his religious teachings refused to participate in a common dining period.

Plaintiff also believed and practiced the basics of our democracy, such as equality regardless of sex, origin, religion,etc. as well as civilian control over military or quasi military.

Because of his views, plaintiff was made into a symbol, for the purpose of intimidating others from believing

in and following the same philosophy.

The co-workers were goaded into direspect and disobedience of the plaintiff. Only those who were honest and fearless sided with the plaintiff.

In 1965, despite the obstacles, plaintiff was finally appointed to the permanent title of Supervising Fire Alarm Dispatcher. This however did not allay the same conditions that had previously prevailed.

Plaintiff respectfully directs the attention of the Court to the Original Records of the pleadings in the District Court, for the exhibits cited therein.

In November of 1967, plaintiff was assaulted on two separate instances by a fireman working under his immediate supervision. Soon after the assaults, all firemen were removed from this work.

Because of the assaults plaintiff requested his superiors to carry plaintiff under the Workmen's Compensation Laws of the State of New York.

The Fire Department failed to file the necessary injury reports as required by law, and was penalized for it by the hearing referee.

The reason for the not filing of the reports was to bar any evidentiary hearings. In fact at the close of the hearings a false statement was submitted to the Compensation Board, which indicated that no assault had been committed nor any altercation had occurred. This was contradictory to the admission made by the Corporation Counsel to the effect that an altercation had occurred.

At no time was there ever permitted to be had an evidentiary

hearing on the matter. Each and every Justice of the Supreme Court denied hearings and obstructed justice.

Mr. Justice Gelinoff of the State Supreme Court, denied plaintiff to inquire under the laws of disclosure, a_nd as previously indicated rendered a res judicata in order to block the possibility of evidentiary hearings on the matter.

In 1968, plaintiff was directed to submit to a medical examination in the filed of psychiatry,unbeknownst to him at that time that such examinations are barred under Rule 35(a) USCA, without the sanction of the Court after an evidentiary hearing. Stemming from this examination at which no tests of any sort were given or taken except for a few minutes of conversation at which time plaintiff's side was not believed and attr_ibuted, to a hypertense condition, a sedative was directed to be prescribed for me by the Medical Division of the Fire Department, but which was never prescribed, for me, instead a request for my retirement on ordinary disability was made to the New York City Employees' retirement System, under §§ B3-39.0, of the New York City Administrative Code, which provided that a departmental request for the retirement of an employee on an ordinary medical disability, must be completed within not less than 30 nor more than 90 days, from the date of the submission of the request.

Tis Section of Law was violated. A retirement could not take place within the 90 day period. Employees of the Fire Department and the Retirement System, conspired to bring the date of the retirement into the 90 day period, and hide the violation of law,

and deprive plaintiff equal protection under the law.

These facts were unknown to me at that time.

In 1968, October, Mr. Eli Kramer Esq., an attorney whom I had retained as far back as December of 1967, filed an Article 78 Petition to upset the retirement.

In 1969, February, Mr. Justice Gold, dnied the petition and at the same time denied an evidentiary hearing, which had been requested by Mr. Kramer, as an alternative, to immediate re-instatemett.

Mr. Eli Kramer filed a Notice of Appeal.

Mr. Eli Kramer having proved himself unsatisfactory and not having any money for an appeal, the plaintiff decided to seek other legal advice.

In 1970 October, Mr. Harry Fractenberg undertook the prosecution of the matter, but failed to perfect the appeal because of lack of legal knowledge, the plaintiff subsequently discovered.

In 1971, Mr. Fractenberg, on behalf of the plaintiff started a suit for damages alleging violation of plaintiff's civil, constitutional and contractual rights.

It was during the course of this proceeding that plaintiff was denied the right to inquire under the Rules for Disclosure, and the right to examine witnesses was denied, especially the said Mr. Egidio Assinelli, a defendant herein, who had submitted a false statement to a gover nmental body, namely the Workmen's Compensation Board of the State of New York.

It was also during the course of this proceeding that the entire file containing the heretofore referred to Article 78 Petition, pleadings, was suppressed, for the purpose of obtaining a res judicata decision which had been requested by the Corporation Counsel. This matter is still pending.

Plaintiff on reading the lawas contained in the CPLR of the State of New York, discovered that an action in the form of a motion could be made under Rule 5015 or 60(b) to vacate the decision on the Article 78 Petition of 1969.

Since this evidence was uncovered prior to the stoppage of the inquiry in 1973, plaintiff had urged his attorney to pursue in that direction. Counsel however waited by design or otherwise, and on July 2, 1975, the motion was again denied on the grounds that plaintiff had waited too long, from 1973 to 1975. Although the Court knew that plaintiff had started an action in Federal Court in January of 1974, this fact was overlooked and again an evidentiary hearing was denied. The fact is that the Corporation Counsel deliberately prolonged each and every proceeding in order to bleed the plaintiff financially dry and at the same time obtain the objective of Laches. Further, the Affidavit only, of the said Motion was submitted, by defendant as an exhibit in a pleading, to this Court, without any comment made thereon. It being my opinion that such act was intended to deceive the Court as to a possible favorable decision that might be rendered in the State Court, and thereby induce a dismissal of this Complaint, injuring the defendant therewith.

CASES CITED

Page

Lombard v. Board of Ed. N.Y.C. Court of Appaeals 2d Circ.

All the cases cited in Lombard v. Board of Education that are applicable in this instant.

All the cases cited by plaintiff heretofore and contained in the Original Record

Please see Exhibit No. 5, Lombard v. Board of Education Decision

POINT 1

THE FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION GAVE THE PLAINTIFF THE RIGHT TO EVIDENTIARY HEARINGS; TO FACE HIS ACCUSERS IN OPEN COURT UNCONTROLED BY THE DEFENDANTS, FOR A DETERMINATION WHETHER THE DEFENDANTS DID FALSELY AND WRONGFULLY DAMAGE THE REPUTAION OF THE PLAINTIFF; WHETHER THE DEFENDANTS ENTERED INTO A COLLUSIVE CONSPIRACY WITH THE INTENT TO REMOVE THE PLAINTIFF FROM HIS POSITION OF SUPERVISING FIRE ALARM DISPATCHER; WHETHER THE DEFENDANTS SUPPRESSED INFORMATION BENEFICIAL TO THE PLAINTIFF AND DISSEMINATED INFORMATION DETRIMENTAL TO THE PLAINTIFF; WHETHER THE DEFENDANTS ENTERED INTO A COLLUSIVE CONSPIRACY TO OBSTRUCT JUSTICE AND TO DENY JUSTICE TO THE PLAINTIFF, WITH THE SOLE INTENT OF DEPRIVING THE PLAINTIFF OF HIS RIGHTFUL CLAIM TO HIS POSITION.

The complaint alleged the violation of plaintiff's Civil, and Constitutional Rights.

Plaintiff had a Constitutional Right to expect that the Judiciary of the City and State of New York, would provide him with <u>equal protection</u> under the law, in accordance with the legal and moral codes of the land. Plaintiff therefore had a Constitutional Right to expect evidentiary hearings in all instances especially prior to a forced visit to a defendant controlled establishment for psychiatric consultation.

Plaintiff had the further Constitutional Right to expect that the Judiciary of the City and State of New York, would take Judicial Notice of the infraction of the law by the defendants, for the sole intent of pre-

judicing the rights of the plaintiff; plaintiff had a further Constitutional Right to expect the Judiciary of the City and State of New York, to take Judicial Notice of a possible conflict between Federal and State Law, and that the plaintiff would, as the accused under the law, be given every benefit of the law.

Plaintiff had a further right to expect that the judiciary would safeguard his Constitutional Rights,at such times when the attorney for the plaintiff fails either by negligence or design or deliberate malpractice to fully protect the rights of his client. The impartiality of the Court requires such an attitude.

Plaintiff had a right to expect that the Courts of the State and County of New York, would be separate and apart and uncontrolled by the City of New York, with employees not on the same payroll as those of the City of New York, in order for justice to be best served, and for the administration of justice to be fair and unbiased.

POINT 2

NEW YORK STATE LAWS GAVE THE PLAINTIFF A PROPERTY RIGHT IN CONTINUATION OF HIS EMPLOYMENT AS A SUPER* VISING FIRE ALARM DISPATCHER, TO WHICH FEDERAL CONSTITUTIONAL DUE PROCESS PROCEDURES APPLIED AND ENTITLED HIM TO TRUE EVIDENTIARY HEARINGS, AND AN OPPORTUNITY TO CHALLENGE ANY OF THE UNSWORN AND UN* VERIFIED ALLEGATIONS SUBMITTED BY THE DEFENDANTS, AT SUCH EVIDENTIARY HEARINGS.

In Board of Regents v. Roth, 408 U.S.564 (1972)

> "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilareral expectation of it. He must,instead, have a legitimate claim of entitlement to it. ***
>
> *** Property interests, of course are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as State Laws -- Rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

The plaintiff had a property right to his position and could not be deprived of it without the application of Fedral Due Process, the examination of witnesses under oath, and the right to refuse to medical examinations under the Fifth Amendment, for the protection of self incrimination. Plaintiff had a further right to be advised of his Constitutional Right to refuse to submit to a psychiatric examination, at such time when the sole intent of the examination was to inflict punishment upon the plaintiff.

POINT 3

THE PLAINTIFF HAD A CONSTITUTIONAL RIGHT TO WRITTEN REASONS AND AN EVIDENTIARY HEARING BEFORE HE COULD BE DIRECTED TO SUBMIT TO A MEDICAL PSYCHIATRIC CONSULTATION, WHERE THE SOLE INTENT WAS TO STIGMATIZE AND DISQUALIFY HIM FROM EMPLOYMENT WITHIN THE CIVIL SERVICE.

Because of the branded condition of mental incapacitance the plaintiff was unable to obtain employment anywhere, until such time as the plaintiff by necessity was forced to resort to guile and deception, apractice abhorrent to the plaintiff, and which decption left him in constant fear of discovery and recriminations therefore.

Plaintiff had a Constitutional Right to written reasons and evidentiary hearings, where those reasons, if any, could be challenged; and a constitutional right to be advised that any statement that he would make could and would be used against him, prior to his being directed to submit to a medical-psychiatric consultation; plaintiff had a Constitutional Right to an evidentiary hearing, where the results of the consultation could be challenged, with witnesses examined under oath; the plaintiff had a further Constitutional Right, to be advis_ed that a doctor patient confidentiality relationship did not exist under such a consultation where the sole intent was to stigmatize and disqualify the plaintiff from employment in the civil service, and to remove him from his position, from which he could not be removed without Federal Due Process.

In Lombard v. Board of Education, Court of Appeals 2d Circuit, (1974), the Court said:

"*** he was deprived of his reputation as a person who was presumably free from mental disorder. Without being given the right to confront witnesses, the termination of his employment was recommended by the Committee of the Superintendent on the primary ground: " I. Illogical and disoriented conversation,causing request for examination by the Medical Department,which found him unfit for duty."

This is not only a finding but a stigma. If it is unsupportable in fact it does grievous harm to appellant's chances for future employment, as indeed the record demonstrates, and not only in the teaching field. For that reason he was entitled to a hearing."

The Court furtner said

" we conclude therefore that he should be given a trial in the district court to determine whether appellees have viclated his constitutional rights.*** "

"***Summary Judgment was inapropriate.***"

"Judgment reversed and remanded."

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD BE REVERSED: DEFENDANTS' MOTION TO DISMISS THE COMPLAINT SHOULD BE DENIED: AND, PLAINTIFF'S MOTIONS SHOULD BE GRANTED.

Respectfully submitted,

Bernard Fried

BERNARD FRIED
Plaintiff-appellant pro se

Dated:
Queens, New York
August 27, 1975

E X H I B I T 1

CONT'D
Before

PLATT, J.

AT 11:00 A.M.

CIVIL CAUSE
PRE-TRIAL CONFERENCE

75 C 279	[illegible]SKY	-vs-	HERSCHER
73 C 1408	HABIB	-vs-	COUNTY OF NASSAU
74 C 1600	PIKIN	-vs-	SURVINE TRANS. CO.
74 C 1517	EVANS	-vs-	FOOD FAIR STORES, INC.
74 C 869	ACKERMAN	-vs-	SOUTHERN WOOD PIEDMONT
74 C 768	DIMION	-vs-	N.Y. TRANSIT AUTHORITY
74 C 1396	LUPO	-vs-	COSTA ARMATORI
75 C 134	FEARN MOTORS, INC.	-vs-	WORLDWIDE VOLKSWAGEN CORP
74 C 1212	SMART	-vs-	LEVINE[illegible]
75 C 12	W.M.R. WATCH CASE CORP.	-vs-	JACOBY-BENDER, INC.
74 C 1803	VOLKSWAGENWERK AG	-vs-	MILORO

CIVIL CAUSE
STATUS REPORT

71 C 890	OTTE	-vs-	FAREN
73 C 584	SCALI	-vs-	JAPAN LINES
74 C 229	E.E.O.C.	-vs-	HOMES
73 C 1486	CABASSO	-vs-	U.S.A.

CIVIL CAUSE
FOR RECALL

74 C 398	HOFFMAN	-vs-	THE DETROIT HILTON
69 C 1476	KANTOR	-vs-	S.I.P.
72 C 1663	VOLK	-vs-	SWISS-AIR

CIVIL CAUSE
TO DISMISS

74 C 219	FRIED	-vs-	LOWERY

AT 2:00 P.M.

CIVIL CAUSE
PRE-TRIAL CONFERENCE

74 C 1565	CAMBIST FILMS, [illegible]	-vs-	CAHN

CRIMINAL HEARING

75 CR 160	U.S.A.	-vs-	PHILIP BASTELLI LOUIS BASTELLI

EXHIBIT 2

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK
----------x

BERNARD FRIED,

Plaintiff,

-against-

ROBERT O. LOWERY, Commissioner JOHN T. O'HAGAN of the Fire Department, THOMAS J. HARNETT, JAMES T. WARD, JOHN V. SCHNEIBLE, CARMINE DeANGELES, EGEDIO E. ASINELLI, DR. GABRIEL SELEY, DR. SEYMOUR CUTLER, DR. JACQUES GABRILOVE, DR. JOHN F. CONNELL, NICHOLAS J. REINHARDT, FRANK KILKENNY, VICTOR ANSORGE, DR. BIAGGIO BATTAGLIO, PATSY MAGGIO, WOODROW OCHS, JOHN M. BARONE, ARTHUR CANARELLO, RICHARD HANRAHAN, RUTH W. WHALEY, KATHLEEN LOCKHART, ARTHUR C. VAN HOUTEN, JOSEPH DUGAN, DR. KAZUO YANAGISAWA, DR. JOSEPH A. CIMINO, DR. THOMAS J. CALVIN, DR. WALTER R. BRINITZER, DR. MAX HELFAND, LEROY CARMICHAEL, as Administrator of Queens General Hospital, DR. GEORGE YESSIN, ADRIAN P. BURKE, as Corporation Counsel, IRWIN L. HERZOG, DONALD L. TOBIAS, FRANCIS J. McNAMEE, FRANK SUROWITZ, SAMUEL GOLDIN, as Comptroller, MARIO PROCACCHINO, MR. JUSTICE SAMUEL M. GOLD, MR. JUSTICE ABRAHAM GELLINOFF, NORMAN GOODMAN, as County Clerk,

Defendants.

----------x

ORDER

74 Civ. 219
(T.C.P.)

The motion of defendants Norman Goodman, as County Clerk, Mr. Justice Samuel M. Gold and Mr. Justice Abraham Gellinoff to dismiss the amended complaint having duly come on to be heard on February 28, 1975 and the motion of defendants Robert O. Lowery, Commissioner John T. O'Hagan of the Fire Department, Carmine DeAngeles, Egedio E. Asinelli, Dr. Gabriel Seley, Dr. John F. Connell, Nicholas J. Reinhardt, Victor Ansorge, Dr. Biaggio Battaglio, Patsy Maggio, Woodrow Ochs, Arthur Canarello, Ruth W. Whaley, Kathleen Lockhart, Arthur C. Van Houten, Joseph Dugan, Dr. Walter R. Brinitzer, Mr. Max Helfand, Leroy Carmichael, as Administrator of Queens General Hospital, Dr. George

Yessin, Dr. Seymour Cutler, Dr. Jacques Gabrilove, Adrian P. Burke, as Corporation Counsel, Irwin L. Herzog, Donald J. Tobias, Francis J. McNamee, Frank Surowitz, and Samuel Goldin, as Comptroller, to dismiss the amended complaint having duly come to be heard on March 21, 1975, it is

ORDERED that the amended complaint herein be and the same is hereby dismissed.

Dated: Brooklyn, New York
April , 1975

U.S.D.J.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK

BERNARD FRIED,

Plaintiff,

-against-

ROBERT O. LOWERY, Commr.
JOHN T. O'HAGAN of the Fire
Dept., et al.,

Defendants.

ORDER

~~W. BERNARD RICHLAND,~~
ADRIAN P. BURKE,
Corporation Counsel
Defts.
Attorney for.....

Municipal Building,
New York, N. Y. 10007

Due and timely service of a copy of the within
is hereby admitted.

New York, ...*19*.....

.....
Attorney for

To

....., *Esq.,*
Attorney for

3-50M-1204048(73) 346

EXHIBIT 3

THE CITY OF NEW YORK
LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

APR 2 1975

Mr. Bernard Fried
88-11 Elmhurst Ave.
Elmhurst, N.Y. 11373

FOR POLICE EMERGENCY ONLY
DIAL 911

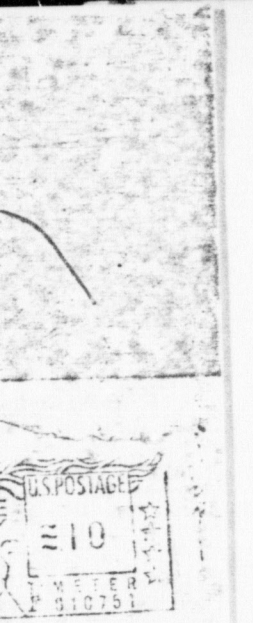

EXHIBIT 4

BETH ISRAEL MEDICAL CENTER
BETH ISRAEL HOSPITAL • MORRIS J. BERNSTEIN INSTITUTE •
GOUVERNEUR HOSPITAL AFFILIATION • BETH ISRAEL SCHOOL OF NURSING
10 Nathan D. Perlman Place, New York, N.Y. 10003
(212) 673-3000.

32

7/16/75

To whom it may concern;

the pt. NATHAN Dechter has been admitted this institution today on an emergency basis with a diagnosis of pancreatitis R/o obstructive biliary disease. His length of stay is difficult to determine at this pt. but most likely will be at least 8 days. I am writing this at the request of the patient.

Sincerely,

Sanford R. Weit MD

EXHIBIT 5

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—September Term, 1973.

(Argued December 5, 1973 Decided July 22, 1974.)

Docket No. 73-2057

JOHN F. LOMBARD,

Plaintiff-Appellant,

—against—

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, and JOHN A. MURPHY,

Defendants-Appellees.

Before:

WATERMAN and FEINBERG, *Circuit Judges,* and GURFEIN, *District Judge.**

Plaintiff-appellant brought a 42 U.S.C. § 1983 action against defendants-appellees alleging unconstitutional violations of his civil rights. He moved for a temporary injunction. Defendants moved to dismiss the action upon the ground that it was barred by res judicata and to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The United States District Court for the Eastern District of New York,

* Of the United States District Court for the Southern District of New York, sitting by designation.

Travia, *J.*, denied the motion for a temporary injunction and granted the motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted.

Judgment below reversed and remanded.

MORRIS WEISSBERG, New York, N.Y., *for Appellant.*

LEONARD KOERNER, New York, N.Y. (Norman Redlich, Corporation Counsel, New York City; Stanley Buchsbaum, on the brief), *for Appellees.*

GURFEIN, *District Judge:*

Plaintiff-appellant John F. Lombard appeals from an order of the United States District Court for the Eastern District of New York, Anthony J. Travia, *J.*, dismissing his complaint against the New York City Board of Education and one John A. Murphy for failure to state a claim upon which relief can be granted and denying as moot his application that pending final disposition of his claims he be granted a preliminary injunction reinstating him as a teacher in the public schools. For permanent relief Lombard seeks from the Board of Education reinstatement as a teacher and an award of all back pay due him. In addition, Lombard seeks money damages from Murphy, the principal of the school where appellant taught, alleging that the principal, by filing false reports with the Board of Education and by also requesting and coercing parents and students to write false reports, had initiated the administrative process which led to and resulted in the discontinuance of Lombard's probationary appoint-

ment. This suit is brought under 42 U.S.C. § 1983[1] with jurisdiction predicated on 28 U.S.C. § 1343(3), (4). There was no opinion below.

Appellant Lombard raises several constitutional claims on this appeal. He contends that he was denied his first amendment rights,[2] and his fourteenth amendment rights to due process under the United States Constitution when his employment as a probationary teacher was terminated by the New York City Board of Education without his first having received written reasons supporting that termination and an evidentiary hearing thereon. He also argues that he was denied his fourteenth amendment rights when the Board of Education disqualified him from teaching with his substitute license without first providing him with written reasons for the disqualification and without granting him an evidentiary hearing.

Appellees Board of Education and Murphy here, as they did in the court below, maintain that res judicata bars all of Lombard's constitutional claims on the grounds that he had a full opportunity to raise all the issues presented to the federal court in state proceedings he had brought to challenge the termination of the probationary appointment. The Board also argues that the appellant was not

---

1 42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2 Although appellant alleges that his first amendment rights have been violated, he offers no factual support in his affidavit in the district court. In view of our disposition we leave the issue without comment.

denied due process as he did not make out a claim that he had been deprived of any fourteenth amendment rights.[3]

The facts follow:

On November 1, 1966, the plaintiff-appellant was assigned as a regular substitute teacher in the New York City public school system to teach at Public School 151 in Queens, New York. He taught as a regular substitute teacher for one year and received a satisfactory rating from his principal, John A. Murphy. On August 11, 1967, the appellant was granted a regular license for a probationary period of three years, effective September 6, 1967. The appellant received credit for one-half year of substitute teaching and therefore his probationary period expired and his permanent appointment became due on March 8, 1970. For his first year of teaching as a regularly licensed teacher in Public School 151, Lombard received a satisfactory rating from his principal.

During his second year as a regular teacher, the 1968-1969 academic year, the principal at Public School 151, John A. Murphy, submitted a report to the Board of Education on March 28, 1969, recommending that the appellant's probationary appointment be discontinued and that he be directed to submit to a medical examination to determine his fitness to teach. In this report and in a subsequent letter of May 5, 1969, the principal enumerated the alleged factual bases for his recommendation that

3 As noted, Judge Travia, without writing an opinion, dismissed the action on the ground that the complaint failed to state a claim upon which relief can be granted. Theoretically, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the inquiry antecedent to this type of dismissal would be restricted to searching the face of the complaint. In his order of dismissal, however, Judge Travia noted that he had relied upon affidavits filed by the plaintiff and the defendants, affidavits which we find contain matters outside the pleadings. In effect, therefore, the judge was required to, and presumably did, dispose of the motion before him as if it were one seeking summary judgment.

Lombard's probationary appointment be discontinued and that Lombard be required to undergo a medical examination.

Murphy indicated that the teacher had committed acts and had made statements showing prejudice against black pupils, that Lombard had engaged in bizarre acts such as kicking students, that he had use obscene language, that he had violated several rules of the school, including failure to punch the time clock properly, and that he had frequently complained that the heat in his classroom was insufficient.

Lombard's complaint, on the other hand, challenges the principal's motivation for recommending the medical examination and the discontinuance of the appellant's probationary appointment and further denies the substance of the charges made by Murphy. Lombard, describing the aforementioned charges made against him by Murphy as "false," alleges that those charges were made "[i]n bad faith and in retaliation and revenge for" certain acts performed by Lombard.

These acts which Lombard claims provoked Murphy to pursue a vendetta against him include complaints by Lombard to Murphy about insufficient heat in the classroom, Lombard's filing of grievances in response to the principal's refusal to allow appellant to examine his own personnel file and the principal's wrongful withholding of appellant's check from him for nine days, Murphy's refusal of the appellant's request that the Chapter Chairman of the United Federation of Teachers in his school be allowed to accompany the appellant to a conference with an assistant principal, and the appellant's submission of written reports which described incidents of disorderly conduct and obscene language used by black pupils.

In May of 1969, the appellant was examined by two staff physicians of the Board of Education and in June of 1969

by a psychologist. The appellant was found to be suffering from an "emotional upset that is of recent origin and is of a paranoid nature." Pursuant to these findings and without a hearing, the appellant was given an involuntary leave of absence until January 31, 1970.

In September of 1969, the appellant commenced a proceeding under Article 78 of the New York Civil Practice Law and Rules in the New York State Supreme Court, Kings County, challenging the authority of the Superintendent of Schools to place him on an involuntary leave of absence, and seeking to be reinstated as a teacher. The petition was dismissed on January 16, 1970 by Justice Feiden.

In January and March of 1970, the appellant was called for further examination by physicians and psychologists to determine his fitness to return to duty. The panel recommended that the leave of absence be extended until June 30, 1970.

On the other hand, while on medical leave of absence the appellant applied to the United States Department of Health, Education and Welfare for a disability allowance. HEW gave the appellant a special examination and received a report from a member of the Board of Education's medical panel. On April 7, 1970, HEW, stating that Lombard was not unable to work at his normal occupation, denied his claim for a disability allowance.

On April 20, 1970, pursuant to section 105a of the By-Laws of the Board of Education, a hearing was held before a Committee of the Superintendent of Schools concerning the appellant's probationary status. At this hearing appellant presented written statements in his support, and several witnesses gave unsworn oral testimony on his behalf. There was no testimony relative to appellant's unfitness to teach, and the principal did not testify. The Committee had before it the reports by the principal and the recom-

mendations of the physicians and psychologists who had examined the appellant. The Committee recommended that the probationary appointment be discontinued on the following five grounds:

(1) Illogical and disoriented conversation, causing request for examination by the Medical Department, which found him unfit for duty.

(2) Weakness in discipline and class control.

(3) Incompetent and ineffective instructional performance.

(4) Inattention to routine matters such as keeping records of pupil attendance, admission or discharges. Poor relations with Supervisors and Teachers.

(5) Violation of the By-Laws on Corporal Punishment.[4]

After Superintendent of Schools Irving Anker had approved the report, the applicable school board, Local School Board No. 23, adopted it on June 11, 1970, to become effective September 10, 1970.

Following his dismissal as a probationary teacher, Lombard sought work with his substitute teacher's license in a number of New York public schools. However, inasmuch as the Board of Education in its Special Circulars #66 for 1971-1972 and #89 for 1972-1973 directed school principals not to hire the appellant as a substitute teacher, he was unable to obtain continuous employment, and, in-

4 A District Superintendent, on June 23, 1969, disapproved Mr. Murphy's charge that the plaintiff had hit certain students because investigation "indicates that there is insufficient reliable evidence to prove that in fact these acts took place."

And we note that Mr. Murphy's charge that appellant had committed acts showing prejudice against black pupils was not found to be a ground for the recommendation.

deed, several schools were forced to dismiss Lombard because of the Board's circular.

In June of 1971, Lombard commenced a second Article 78 proceeding in Supreme Court, Kings County, to review the termination of his probationary appointment and to seek reinstatement as a teacher. Justice Cowin denied the petition on June 27, 1972. The Appellate Division affirmed without opinion, 40 App. Div. 2d 1081, 337 N.Y.S. 2d 1003 (2d Dep't 1972), and on February 15, 1973 the Court of Appeals denied leave to appeal, 31 N.Y.2d 648.

In March of 1973, Lombard commenced this action in the Eastern District of New York.

The appellees contend that this suit is barred by the doctrine of res judicata because the appellant had a full opportunity in his Article 78 proceedings in the state courts to raise all of the issues relating to termination of his services as a probationary teacher. In the first proceeding, in Supreme Court, Kings County, Lombard contended that the Board of Education had failed to comply with a provision of its own by-laws and that its direction to him that he apply for leave of absence without pay was invalid for he still had unexhausted sick leave with pay he was entitled to exhaust. This petition was denied, and the act of the Board was upheld.

In the second, and more important, proceeding, commenced in June of 1971 in Supreme Court, Kings County, the appellant challenged the validity of the order terminating his services as a probationary teacher. He alleged that the Board of Education had acted illegally in terminating his probationary appointment three months after his probationary term of service had expired. Lombard further alleged that the Board of Education's action in terminating his probationary appointment on the ground that he was an unsatisfactory teacher "was illegal, arbitrary and capricious and without foundation and must

have been primarily based on the fact that Petitioner's former principal, Mr. John A. Murphy, personally disliked petitioner and was determined to bar him from teaching in the Elementary Schools of the City of New York." It was thus Lombard's position in this state court proceeding, as it is here, that the charges made by Murphy and the unsatisfactory rating issued by him caused the termination of Lombard's probationary appointment and that those charges and that rating were unjustified and without foundation.

In denying the petition, Justice Cowin stated:

> The primary thrust of petitioner's argument is that he acquired tenure by acquiescence. He (petitioner) argues that since his probationary appointment ended in March of 1970 and respondents did not vote to terminate his services until June 1970, he acquired tenure by operation of law.

Disagreeing with this argument Justice Cowin found that the appellant had not completed his required probationary service at the time his appointment was terminated, and then discussed Lombard's contention that he was entitled to back pay. Finally, at the very end of his opinion, Justice Cowin declared:

> The court is also of the opinion that the hearing accorded petitioner was proper and that the determination made to terminate his services was not arbitrary or capricious.

Lombard did not specifically raise the fourteenth amendment constitutional issue in either of these two Article 78 proceedings, but the appellees argue that, nevertheless, the appellant should have raised them in those state pro-

ceedings, and that his failure to do so precludes him from raising them in this section 1983 action.

I

Whether it is called res judicata or claim preclusion, as Judge Waterman so convincingly demonstrated in *Divine* v. *CIR*, the tests of claim preclusion are not to be applied mechanically but are "intended only to apply to certain classes of issues which for policy reasons it has been decided should generally be litigable only once." Slip op. 4293, 4305 (2d Cir. June 20, 1974). For several reasons, we think that policy considerations should not permit the extension of the res judicata doctrine in this case to issues of procedural due process which are said to raise claims under 42 U.S.C. § 1983.

First, when the Civil Rights Act was authoritatively interpreted in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), the Supreme Court said:

> The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

To apply res judicata to a remedy which "need not be first sought and refused" in the state court, and which actually was not sought would be to overrule the essence of *Monroe* v. *Pape* and *Lane* v. *Wilson*, 307 U.S. 268, 274 (1939).

Second, if a federal action under section 1983 is considered to be the *same* cause of action as the state action for purposes of claim preclusion then a plaintiff desiring to raise a state statutory construction issue or even a state constitutional issue would, and probably should, not be able to raise these points in the federal district court in the first instance. See *Reid* v. *Board of Educ.*, 453 F.2d 238 (2d Cir. 1971); *Coleman* v. *Ginsberg*, 428 F.2d 767

(2d Cir. 1970). Here, even if we would like to put all the issues in the same court, we are better off not to *compel* the plaintiff to seek constitutional redress in the state court or statutory construction in the federal court. See *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963). That is what we think choice of forum means in Civil Rights Act cases.

Third, while the per curiam opinion in *Frazier* v. *East Baton Rouge School Board*, 363 F.2d 861 (5th Cir. 1966), contains language that appears to support the application of res judicata in a section 1983 action to a failure to raise the constitutional claim in the state courts, it raises various policy problems if applied to the case at bar. The court in *Frazier* said that "the judgment is conclusive as to all matters which were litigated or *might have been litigated* in the first action." 363 F.2d at 862. The court added that "the only appropriate federal forum for review of his alleged federal claim of discrimination was the United States Supreme Court." Id. But if the appellant inadvertently or through his lawyer's mistake failed to raise the constitutional claim, it is small comfort to tell him that he should look to the Supreme Court for redress. It seems clear enough that if the appellant actually failed to assert his constitutional claim in the state court he could not get a writ of certiorari from the nonconstitutional judgment of the state court. 28 U.S.C. § 1257(3); Sup. Ct. Rule 19; *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969); *Ellis* v. *Dixon*, 349 U.S. 458 (1955); *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 162 (1932) ("failure to make seasonably the federal claim"). We prefer to treat the statement in *Frazier* as *obiter* so far as a *procedural* due process claim is concerned, since in *Frazier* there had been a "full hearing" in the state court and procedural due process was not involved.

So, too, other opinions which in language support an extension of the res judicata rule did not involve a claim of deprivation of procedural due process, see *Johnson* v. *Department of Water and Power,* 450 F.2d 294 (9th Cir. 1971), or the appellant had failed to object to evidence. *Coogan* v. *Cincinnati Bar Ass'n,* 431 F.2d 1209 (6th Cir. 1970). *Howe* v. *Brouse,* 422 F.2d 347 (8th Cir. 1970), was a case where the defendant judge had already been held by the state court to have judicial immunity.

We think that the problem, strictly speaking, is not a res judicata problem. We think it is rather a question of whether the appellant has "waived" his constitutional rights. It is not quite fair to say that he "waived" his right to assert in the administrative agency itself that the process afforded was not "due process." For such an attack in the administrative agency itself on the ground of unconstitutionality would be futile. Cf. *McNeese* v. *Board of Educ.,* supra, 373 U.S. at 675. See also Judge Friendly's explanation of *Damico* v. *California,* 389 U.S. 416 (1967), in *Eisen* v. *Eastman,* 421 F.2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Friendly, Federal Jurisdiction: A General View 100 & n.111. Nor is the plaintiff required to make the attack in an Article 78 proceeding in the state court, for section 1983 gives him an independent supplementary cause of action, and he may choose the federal court as the preferred forum for the assertion of constitutional claims of violation of due process. *McNeese* v. *Board of Educ.,* supra. Indeed, if waiver is treated as a modality of exhaustion of remedy, the exhaustion, similarly, need not be of the state judicial remedy, but only of the administrative remedy. See *James* v. *Board of Educ.,* 461 F.2d 566 (2d Cir. 1972).

Of course, where a constitutional issue is actually raised in the state court, as it can be in an Article 78 proceeding

by treating it as an action for a declaratory judgment, *Matter of Kovarsky* v. *Housing & Development Administration,* 31 N.Y.2d 184 (1972), the litigant has made his choice and may not have two bites at the cherry. See *Thistlethwaite* v. *City of New York,* slip op. 3441 (2d Cir. May 13, 1974). Nor need we consider here the situation of a constitutional claim where no independent supplementary cause of action like an action under the Civil Rights Act is involved, and where the constitutional claim could have been adjudicated just as well by the state court. See *American Surety Co.* v. *Baldwin,* supra, 278 U.S. at 164-67. For the foregoing reasons policy prevents the application of res judicata (claim preclusion) in this case.

If we treat the problem as a more limited one of collateral estoppel (issue preclusion), policy still prevents its application for the reasons given. In addition, for the doctrine of issue preclusion to be applicable, the determination of the issue must have been *necessary* to the decision. Restatement (Second) of Judgments § 68h (Tent. Draft No. 1, 1973); *Halpern* v. *Schwartz,* 426 F.2d 102 (2d Cir. 1970). There may have been a number of reasons why Lombard was dismissed without a determination on the merits of the issue whether Murphy's charges were based upon bias or even reprisal. The failure to put Murphy on his oath and to permit Lombard to cross-examine him tends to support the conclusion that a finding on Murphy's bias was not necessary to the decision that Lombard was mentally unfit.

Finally, the policy conclusions may be stated in summary form. First, it is not consistent with *Monroe* v. *Pape,* supra, to put appellant in a position where he cannot raise the constitutional question on an application for a writ of certiorari either to the state court *or* to the federal court, i.e., to *any* court. Second, it is not consistent with consti-

tutional due process to permit to stand a "finding" that appellant is, in effect, mentally incompetent or inadequate without giving him an opportunity in *any* tribunal to confront his accusers in an evidentiary type of hearing.

II

Turning to the merits, we hold that appellant's case comes within the exception stated in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Though Lombard did not have tenure and, therefore, presumptively had no property right either as a probationary or substitute teacher, *Canty* v. *Board of Educ.*, 470 F.2d 1111 (2d Cir. 1972), cert. denied, 412 U.S. 907 (1973), he was deprived of his reputation as a person who was presumably free from mental disorder. Without being given the right to confront witnesses, the termination of his probationary employment was recommended by the Committee of the Superintendent on the primary ground: "I. Illogical and disoriented conversation, causing request for examination by the Medical Department, which found him unfit for duty."

This is not only a finding but a stigma. If it is unsupportable in fact it does grievous harm to appellant's chances for further employment, as indeed the record demonstrates, and not only in the teaching field. For that reason he was entitled to a full hearing.

The distinction taken by the Court in *Roth* is that where the appellant's "good name, reputation, honor, or integrity is at stake" or "the State, in declining to re-employ [the respondent], imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," 408 U.S. at 573, he may claim a deprivation of "liberty" under the due process clause of the fourteenth amendment. A charge of mental illness,

purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding. Cf. *Birnbaum* v. *Trussell,* 371 F.2d 672 (2d Cir. 1966) (accusation of racial bias). Unfortunately, the district court did not write an opinion revealing the precise basis of its decision. But we construe the judge's ruling as resting on a determination—which we have held to be incorrect—that Lombard had no protected interest entitling him to due process. We conclude, therefore, that he should be given a trial in the district court to determine whether appellees have violated his federal constitutional rights. Cf. *Arnett* v. *Kennedy,* 42 U.S.L.W. 4513, 4520, 4531 (U.S. April 16, 1974) (noting right to plenary post-termination hearing). Summary judgment was inappropriate. Cf. *Leonard* v. *Sugarman,* 466 F.2d 1366, 1367 (2d Cir. 1972) (plaintiff did not "seriously contest" charges of misconduct). In reversing the judgment we remand for further consideration of Lombard's motion for a preliminary injunction in conformity with this opinion.

Judgment reversed and remanded.

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D.C. 106

74 C 219 PLATT, J.

DOCKET

TITLE OF CASE	ATTORNEYS
BERNARD FRIED -against- FIRE DEPARTMENT, CITY OF NEW YORK; EMPLOYEE'S RETIREMENT SYSTEM; QUEENS GENERAL HOSPITAL; COMPTROLLER, CITY OF NEW YORK; CORPORATION COUNSEL; BOARD OF ESTIMATE; SUPREME COURT, NEW YORK COUNTY; COUNTY CLERK, NEW YORK COUNTY	*For Plaintiff:* Bernard Fried 88-11 Elmhurst Avenue Elmhurst, N.Y. 11373 *For Defendant:*

BASIS OF ACTION: Civil rights

JURY TRIAL CLAIMED

ON

DATE	PLAINTIFF'S ACCOUNT	RECEIVED		DISBURSED		DATE	DEFENDANT'S ACCOUNT	RECEIVED		DISBURSED	
2-8-74	Complaint	15	00								
5-1-74	Paid to Treas.			15							

ABSTRACT OF COSTS			RECEIPTS, REMARKS, ETC.
TO WHOM DUE	AMOUNT		

74C 219 FRIED - vs. - FIRE DEPT. et al

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
		1	JS5
2-8-74	Complaint filed. Summons issued.	2	
3/11/74	Notice of Motion, ret. 3/22/74 filed re: for dismissal	3	
3/11/74	Deft's Memorandum of Law filed.		
3-13-74	Notice of motion and memorandum of law to dismiss complaint ret 3-29-74 at 10 A.M. filed.	4/5	
3-20-74	Summons returned and filed/executed.	6	
4/10/74	Notice of Motion, ret. 5/3/74 filed re: to bar corporate counsel deft from acting in own defense, etc.	7	
[illegible]/74	Affidavit in Opposition to motion to dismiss complaint filed.	8	
[illegible]/74	Pltffs Memorandum of Law filed.	9	
7-19-74	Before PLATT, J. - Case called. Deft motion to dismiss argued Decision reserved. Submit order. Pltff motion for default judgment - Decision reserved		
10-22-74	By PLATT, J.-Order and memorandum dated 10-22-74 dismissing pltff's complaint without prejudice to his right to file and serve a new complaint within sixty(60) days filed. Copies mailed	10	
12-16-74	Amended complaint filed. Additional summons issued.	11	
1/8/75	Notice of Motion , ret. 1/31/75 filed re: to dismiss the complaint, etc.	12	
1/8/75	Memorandum of Law for Defts N. Goodman, et al filed.	13	
[illegible]/75	Notice of Motion to bar and enjoin the atty gen. of the State of N.Y. from interposing any and all pleadings in defense of defts in this matter filed, ret. 1/24/75	14	
1/10/75	By PLATT,J.- Order dated 1/9/75 filed that the time for the deft to answer the complaint is extended to 2/28/75	15	
1-17-75	Additional summons returned & filed/Unexecuted as to F. Kilkenny, J. Ward, J. Schneible. V/ Ansorge, J. Barone , M. Proccachino	16	
1/24/75	Pltff's Memorandum of Law filed.	17	
1/24/75	Affidavit in Opposition to Motion to Enlarge Time made ex parte filed.	18	
1/24/75	Affidavit in Opposition to motion and memorandum on law by atty general state of N.Y. filed.	19	
1/24/75	Before PLAT,J.- Case called- Adjd to 1/31/75		
1/27/75	Request for Incorporation of Pleadings from Motion of 1/24/75 into the affidavit in opposition to dismiss complaint against the Judiciary only filed.	20	
1/31/75	Before PLATT,J.- Case called. Pltff's Motion to Bar and enjoin [illegible] Decision reserved Deft's motion to dismiss-Decision res'd		

Continued

IVIL DOCKET

DATE	FILINGS—PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT	AMOUNT REMITTED IN PAYMENT RETURNS
2-14-75	Notice of motion and memorandum of to dismiss complaint ret 2-28-75 at 10 A.M. filed.			21/2
3-3-75	Pltff's request for admission filed.			23
3-3-75	Pltff's request for production filed.			24
3-17-75	Pltff's affidavit in opposition to deft's motion to dismiss filed.			25
3-17-75	Pltff's affidavit in opposition to ex parte motion by deft filed.			26
3-17-75	Pltff's memorandum of law in support of affidavit in opposition filed.			27
3-21-75	By Platt, J. - Order dtd 3-17-75 extending time of defts to answer request to produce to the 30th day following entry of an order determining the moving defts' motion to dismiss filed.			28
[illegible]-75	Before PLATT, J.--Case called. Deft's motion to dismiss granted. Submit order.			1
4-14-75	By PLATT, J.-Order dtd 4-11-75 dismissing the amended complaint filed. (p/c mailed to attys)			29
5/9/75	NOTICE OF APPEAL FILED. Duplicate of Docket Entries and Notice of Appeal mailed to the attys.			30
5-12-75	Record on appeal certified and mailed to C of A.			

A TRUE COPY ATTEST 5/12/75
LEWIS ORGEL, CLERK
By [illegible] DEPUTY CLERK

D. C. 110

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

BERNARD FRIED,

Plaintiff,

- against - : 74 Civ. 219

ROBERT O. LOWERY., et al.,

Defendants,

----------X

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Notice of Motion to bar corporate counsel defenda nt from acting in own defense.	7
Affidavit in opposition to motion to dismiss complaint.	8
Platt's Memorandum of Law	9
By Platt, J., Order and memorandum dated 10-22-74 dismissing pltff's complaint without prejudice to his right to file and serve a new complaint within sixty (60) days filed. Copies mailed.	10
Amended complaint filed. Additional summons issued (missing)	11
Notice of Motion, ret, 1/31/75 filed re: to dismiss the complaint etc.	12
Memorandum of Law for Defts. N. Goodman, et al filed	13
Notice of Motion to bar and enjoin Atty. Gen. State of New York, from interposing any and all pleadings in defense of defendants in this matter filed, ret. 1/24/75	14

By Platt, J., - Order dated 1/9/75 filed tat the time for deft. to answer the complaint is extended to 2/28/75	15
Additional summons returned & filed/ Unexecuted as to F. Kilkenny, J. Ward, V. Ansorge., J. Barone, M.Procaachino. (Missing)	16
Plaintiff's Memorandum of La w filed	17
Affidavit in Opposition to Motion to Enlarge Time made ex parte filed	18
Affidavit in Opposition to motion and memorandum of Law by Atty. Gen. State of New York, filed.	19
Request for incorporation of pleadings from Motion of 1/24/75, into the Affidavit in Opposition to Motion to dismiss Complaint against the Judiciary only filed.	20.
Notice of Motion and Memorandum of Law to Dismiss Complaint ret. 2/28/75 at lo A.M.. filed.	21/22
Plaintiff's Request for Admission filed.	23
Plaintiff's Request for Production filed	24
Plaintiff's Affidavit in Opposition to deft's Motion to Dismiss filed.	25
Plaintiff's Affidavit in opposition to ex parte motion by defendant, filed	26
Plaintiff's Memorandum of Law in support of Affidavit in Opposition filed.	27
By Platt, J., - Order dated 3/17/75, extending time of defendants to answer request to produce, to the 30th day following entry of an order determining the moving motion to dismiss filed.	28
By Platt, J., - Order dated 4-11-75, dismissing the Amended Complaint filed. (p/c mailed to atty.)	29
NOTICE OF APPEAL FILED. Duplicate of Docket entries and Notice of Appeal mailed to the attys.	30
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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BERNARD FRIED,

Plaintiff,

-against-

ROBERT O. LOWERY, Commissioner JOHN T. O'HAGAN of the Fire Department, THOMAS J. HARNETT, JAMES T. WARD, JOHN V. SCHNEIBLE, CARMINE DeANGELES, EGEDIO E. ASINELLI, DR. GABRIEL SELEY, DR. SEYMOUR CUTLER, DR. JACQUES GABRILOVE, DR. JOHN F. CONNELL, NICHOLAS J. REINHARDT, FRANK KILKENNY, VICTOR ANSORGE, DR. BIAGGIO BATTAGLIO, PATSY MAGGIO, WOODROW OCHS, JOHN M. BARONE, ARTHUR CANARELLO, RICHARD HANRAHAN, RUTH W. WHALEY, KATHLEEN LOCKHART, ARTHUR C. VAN HOUTEN, JOSEPH DUGAN, DR. KAZUO YANAGISAWA, DR. JOSEPH A. CIMINO, DR. THOMAS J. CALVIN, DR. WALTER R. BRINITZER, DR. MAX HELFAND, LEROY CARMICHAEL, as Administrator of the Queens General Hospital, DR. GEORGE YESSIN, ADRIAN P. BURKE, as Corporation Counsel, IRWIN L. HERZOG, DONALD L. TOBIAS, FRANCIS J. MCNAMEE, FRANK SUROWITZ, SAMUEL GOLDIN, as Comptroller, MARIO PROCACACHINO, MR. JUSTICE SAMUEL M. GOLD, MR. JUSTICE ABRAHAM GELLINOFF, NORMAN GOODMAN, as County Clerk,

Defendants.

M'FILMED

ORDER

74 Civ. 219
(T.C.P.)

The motion of defendants Norman Goodman, as County Clerk, Mr. Justice Samuel M. Gold, and Mr. Justice Abraham Gellinoff to dismiss the amended complaint having duly come on to be heard on February 28, 1975, the Court having heard Louis J. Lefkowitz, Attorney General, attorney for movants, by Burton Herman, Esq., Assistant Attorney General, for the motion and Bernard Fried, pro se, in opposition thereto, and the motion of defendants Robert O. Lowery, Commissioner John T. O'Hagan of the Fire Department, Carmine DeAngeles, Egedio E. Asinelli, Dr. Gabriel Seley, Dr. John

F. Connell, Nicholas J. Reinhardt, Victor Ansorge, Dr. Biaggio Battaglio, Patsy Maggio, Woodrow Ochs, Arthur Canarello, Ruth W. Whaley, Kathleen Lockhart, Arthur C. Van Houten, Joseph Dugan, Dr. Walter R. Brinitzer, Dr. Max Helfand, Leroy Carmichael, as Administrator of Queens, General Hospital, Dr. George Yessin, Dr. Seymour Cutler, Dr. Jacques Gabrilove, Adrian P. Burke, as Corporation Counsel, Irwin L. Herzog, Donald J. Tobias, Francis J. McNamee, Frank Surowitz, and Samuel Goldin, as Comptroller, to dismiss the amended complaint having duly come on to be heard on March 21, 1975, W. Bernard Richland, Corporation Counsel, attorney for movants by Gary L. McMinimee, Esq., Assistant Corporation Counsel, having appeared for the motion and Bernard Fried, pro se, having failed to timely appear, it is

ORDERED that the amended complaint herein be and the same is hereby dismissed.

Dated: Brooklyn, New York
April 11, 1975

Thomas C. Platt
U.S.D.J.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Gary McMinimee being duly sworn, says that on the 7th day of April 1975, he served the annexed order upon Bernard Fried Esq., the attorney for the plaintiff, pro se, herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said plaintiff at No. 88-11 Elmhurst Avenue, Elmhurst, New York, 11373, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 9th day of April 1975

ALLEN F. LONDON, Notary Public,
State of New York, No. 31-4524691
Qualified in New York County
Commission Expires March 30, 1976

Allen London

Gary McMinimee

Form 323-50M-721047(72) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Gary McMinimee being duly sworn, says that on the 7th day of April 1975, he served the annexed order upon Burton Herman Esq., the attorney for the co-defendants herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. Two World Trade Center in the Borough of Manhattan, City of New York, being the address within the State theretofore designated by him for that purpose.

54(a)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK
----------x

BERNARD FRIED,

Plaintiff,

-against-

ROBERT O. LOWERY, Commissioner JOHN T. O'HAGAN of the Fire Department, THOMAS J. HARNETT, JAMES T. WARD, JOHN V. SCHNEIBLE, CARMINE DeANGELES, EGEDIO E. ASINELLI, DR. GABRIEL SELEY, DR. SEYMOUR CUTLER, DR. JACQUES GABRILOVE, DR. JOHN F. CONNELL, NICHOLAS J. REINHARDT, FRANK KILKENNY, VICTOR ANSORGE, DR. BIAGGIO BATTAGLIO, PATSY MAGGIO, WOODROW OCHS, JOHN M. BARONE, ARTHUR CANARELLO, RICHARD HANRAHAN, RUTH W. WHALEY, KATHLEEN LOCKHART, ARTHUR C. VAN HOUTEN, JOSEPH DUGAN, DR. KAZUO YANAGISAWA, DR. JOSEPH A. CIMINO, DR. THOMAS J. CALVIN, DR. WALTER R. BRINITZER, DR. MAX HELFAND, LEROY CARMICHAEL, as Administrator of Queens General Hospital, DR. GEORGE YESSIN, ADRIAN P. BURKE, as Corporation Counsel, IRWIN L. HERZOG, DONALD L. TOBIAS, FRANCIS J. McNAMEE, FRANK SUROWITZ, SAMUEL GOLDIN, as Comptroller, MARIO PROCACCHINO, MR. JUSTICE SAMUEL M. GOLD, MR. JUSTICE ABRAHAM GELLINOFF, NORMAN GOODMAN, as County Clerk,

Defendants.

----------x

ORDER

74 Civ. 219
(T.C.P.)

The motion of defendants Norman Goodman, as County Clerk, Mr. Justice Samuel M. Gold and Mr. Justice Abraham Gellinoff to dismiss the amended complaint having duly come on to be heard on February 28, 1975 and the motion of defendants Robert O. Lowery, Commissioner John T. O'Hagan of the Fire Department, Carmine DeAngeles, Egedio E. Asinelli, Dr. Gabriel Seley, Dr. John F. Connell, Nicholas J. Reinhardt, Victor Ansorge, Dr. Biaggio Battaglio, Patsy Maggio, Woodrow Ochs, Arthur Canarello, Ruth W. Whaley, Kathleen Lockhart, Arthur C. Van Houten, Joseph Dugan, Dr. Walter R. Brinitzer, Mr. Max Helfand, Leroy Carmichael, as Administrator of Queens General Hospital, Dr. George

Yessin, Dr. Seymour Cutler, Dr. Jacques Gabrilove, Adrian P. Burke, as Corporation Counsel, Irwin L. Herzog, Donald J. Tobias, Francis J. McNamee, Frank Surowitz, and Samuel Goldin, as Comptroller, to dismiss the amended complaint having duly come to be heard on March 21, 1975, it is

ORDERED that the amended complaint herein be and the same is hereby dismissed.

Dated: Brooklyn, New York
April , 1975

U.S.D.J.

Index No..... Year 19.....

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK

BERNARD FRIED,

Plaintiff,

-against-

ROBERT O. LOWERY, Commr.
JOHN T. O'HAGAN of the Fire
Dept., et al.,

Defendants.

56(a).

ORDER

~~W. BERNARD RICHLAND,~~
ADRIAN P. BURKE,
Corporation Counsel
Attorney for Defts.

Municipal Building,
New York, N. Y. 10007

Due and timely service of a copy of the within
is hereby admitted.

New York, ...19.....

.....
Attorney for

To

....., *Esq.,*
Attorney for

3-50M-120404B(73) 346

File Number 74 C 219

BERNARD FRIED

Plaintiff-Appellant,

- against -

ROBERT O. LOWERY, et al.,

Defendant,

NOTICE OF APPEAL

Notice is hereby given that BERNARD FRIED, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Order submitted by defendant, dismissing the Complaint, entered in this action on the 14th day of April, 1975.

BERNARD FRIED
Plaintiff, pro se
88-11 Elmhurst Avenue
Elmhurst, New York, 11373
Phone: 212-478-6655

ORIGINAL

AO Form No. 182
Form approved by
Comp. Gen., U. S.
January 8, 1953

RECEIPT FOR PAYMENT

55

United States Court of Appeals

FOR THE SECOND CIRCUIT

OFFICE OF THE CLERK

Received Bernard Fried, Esq
(NAME)
88-11 Elmhurst Ave, Elmhurst NY
(ADDRESS)

75-7287 (CASE NO.) Fried v Lowery et al (SHORT TITLE) 5/15/75 (DATE)

ACCOUNT	AMOUNT	
Clerk's Fee for docketing case	$50	00
— —		
Miscellaneous Fees		
Certified copy of		
Copy of Opinion		
Certificate of admission		
Copy of Court Rules		
TOTAL	$50	00

Clerk ☐
Deputy Clerk ☐
Cler. Asst. ☑ [signature]

32940

FORM C

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DEPARTMENT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

74

MAY 15 1975
NEW YORK CITY

CIVIL APPEAL PRE-ARGUMENT STATEMENT

(To be filed by appellant with Clerk of Court of Appeals and served on other parties within ~~ten days~~ after filing notice of appeal.)

ATTORNEY GENERAL

(Attach additional sheets if space is not sufficient)

APPEAL FROM DISTRICT COURT

DISTRICT ▶	EASTERN
DISTRICT COURT DOCKET NUMBER ▶	74 Civ. 219
DATE FILED IN DISTRICT COURT ▶	MO. 2 DAY 8 YEAR 74
DATE NOTICE OF APPEAL FILED ▶	5 9 75
RELATED CASE(S) ▶	

CASE TITLE (Complete)

BERNARD FRIED,
Plaintiff,
Appellant

- against -

ROBERT O. LOWERY, et al.,
Defendant,

Is this a cross appeal? YES ☐ NO ☒

COUNSEL NAME	ADDRESS	TELEPHONE
FOR APPELLANTS: Bernard Fried	88-11 Elmhurst Ave, Elmhurst, N.Y. 11373	458-6655

FOR APPELLEES: Louis Lefkowitz, Attorney General State of New York
2 World Trade Center, New York, N.Y.

W. Bernard Richland, Corporation Counsel City of New York
Municipal Building, Manhattan, New York, New York, 10007

(Check One Box Only)

NATURE OF SUIT

CONTRACT	TORTS	ACTIONS UNDER STATUTES: CIVIL RIGHTS	FORFEITURE/PENALTY	PROPERTY RIGHTS	OTHER STATUTES
☐ INSURANCE	PERSONAL INJURY	☒ VOTING	☐ AGRICULTURE	☐ COPYRIGHT ☐ TRADEMARK	☐ STATE RE APPORTIONMENT ☐ AGRICULTURAL ACTS
☐ MARINE	☐ AIRPLANE	☐ JOBS	☐ FOOD & DRUG	☐ PATENT	☐ ANTI TRUST ☐ ECONOMIC STABILIZATION ACT
☐ LLER ACT	☐ ASSAULT, LIBEL & SLANDER	☐ ACCOMMODATIONS	☐ LIQUOR LAWS		☐ BANKRUPTCY TRUSTEES
☐ NOTIABLE STRUMENT	☐ FEDERAL EMPLOYERS LIABILITY	☐ WELFARE	☐ R.R. & TRUCK		☐ BANKS AND BANKING ☐ ENVIRONMENTAL MATTERS
☐ RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT	☐ MARINE	☐ OTHER CIVIL RIGHTS	☐ AIR LINE REGS		☐ COMMERCE ICC RATES, ETC. ☐ CONSTITUTIONALITY OF STATE STATUTES
☐ OTHER CONTRACT	☐ MOTOR VEHICLE	PRISONER PETITIONS	☐ OTHER		☐ DEPORTATION ☐ NARA, TITLE III
	☐ OTHER PERSONAL INJURY	☐ VACATE SENTENCE (2255)	LABOR		☐ SELECTIVE SERVICE
REAL PROPERTY	PERSONAL PROPERTY	☐ PAROLE BRD. REVIEW	☐ FAIR LABOR STANDARDS		☐ SECURITIES COMMODITIES EXCHANGE ☐ OTHER STATUTORY ACTIONS
☐ CONDEMNATION	☐ FRAUD	☐ HABEAS CORPUS	☐ LABOR/MGMT. RELATIONS		☐ SOCIAL SECURITY
☐ FORECLOSURE	☐ OTHER PERSONAL PROPERTY DAMAGE	☐ MANDAMUS	☐ LABOR/MGMT. REPORTING & DISCLOSURE ACT		☐ TAX SUITS
☐ RENT LEASE & EJECTMENT		☐ CIVIL RIGHTS	☐ RAILWAY LABOR ACT		
☐ TORTS TO LAND			☐ OTHER LABOR LITIGATION		
☐ ALL OTHER REAL PROPERTY					

METHOD OF DISTRICT COURT DISPOSITION

Judgment before trial:		Prisoner petition:	
Summary Judgment	☐	Granted	☐
Dismissal	☒	Denied	☐
Other	☐		
Judgment during or after trial:		Injunction:	
Court trial	☐	Granted	☐
Jury trial	☐	Denied	☐
During trial	☐		
Appeal from order:		Damages:	
Preliminary injunction	☐	Granted	☐
Class action	☐	Amount $	
Amend answer	☐		
Enforce settlement	☐	Denied	☐
Counsel fees	☐	Other relief (specify)	
Stay	☐		
Other	☒		

APPROXIMATE SIZE OF RECORD ▶ 29 NUMBER OF EXHIBITS ▶ HAS TRANSCRIPT BEEN MADE? YES ☒ NO ☐

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT BELOW: Civil Rights. Conspiracy and collusion. Unlawfull forced retirement on medical disability. Denial of justice in State Courts.

Appellant erred in reading time on Court Calendar for March 21, 1975. Case dismissed and defendant directed to submit Order. Court refused to accept appologies of plaintiff-appellant, made within one (1) hour after decision or to look at posted Court Calendar, which would indicate the extenuating circumstance, for such error.

ISSUES PROPOSED TO BE RAISED ON APPEAL: No decisions were made the Court upon the issues which had been raised after amended summons.
39.A Constitutionality of Section B3-39.0, of the New York City Administrative Code, which conflicts with Rule 35A, USCA, Question of the propriety of Jurisdiction over Supreme Court, State of New York, Question of propriety of defenses entered by Attorney General State of New York, and Corporation Counsel City of New York, by failing to provide equal protection under the law for plaintiff and other issues.

I, Attorney for the Appellant, hereby certify that satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript (FRAP 10 (b). (Check one box)

☐ (1) have already ordered the transcript to be prepared OR

☐ (2) will order it to be prepared at the time required by the Staff Counsel in the implementation of the Civil Appeals Management Plan.

COUNSEL'S SIGNATURE Bernard Fried DATE 5/14/75

FORM D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

60

TRANSCRIPT INFORMATION
CIVIL APPEAL

To be completed by counsel for appellant in civil appeal from district court within ten days after filing notice of appeal.

DISPOSITION OF COPIES: (1) to Clerk of the Court of Appeals; (2) and (3) to Court Reporter; (4) Counsel for Appellee (5) retained by Counsel for Appellant.

THIS SECTION TO BE COMPLETED BY COUNSEL FOR APPELLANT

CASE TITLE	DISTRICT	DOCKET NUMBER
[illegible], Plaintiff, - against - ROBERT C. LOWRY, et al., Defendants,	EASTERN DISTRICT OF NEW YORK	74 Civ. 217
	JUDGE: Thos. C. Platt	APPELLANT: Bernard Frieu
	COURT REPORTER: Ira Rubenstein, Joseph Benecetto	COUNSEL FOR APPELLANT: pro se

TRANSCRIPT ORDER
ust be completed

DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATES)

otion to Dismiss
January 31, 1975
otion to Dismiss
March 21, 1975

☐ I am ordering a transcript.

☐ I am not ordering a transcript.
Reason:

☐ Daily copy is available.
☐ Other. Attach explanation.

Transcripts have already been obtained

Ira Rubenstein donated services

Joseph Benecetto, Total Charge $10.00.

METHOD OF PAYMENT ☐ FUNDS ☐ CJA VOUCHER (CJA 21)

☐ PREPARE TRANSCRIPT OF PRE-TRIAL PROCEEDINGS
☐ PREPARE TRANSCRIPT OF TRIAL
☐ PREPARE TRANSCRIPT OF OTHER POST-TRIAL PROCEEDINGS
☐ PREPARE (Other: Specify)

DELIVER TRANSCRIPT TO: (NAME, ADDRESS, TELEPHONE)

Transcripts received by

Bernard Frieu
88-11 Elmhurst Avenue
Elmhurst, New York, 11373
212-458-5655

I certify that I have made satisfactory arrangements with the court reporter for payment of the cost of the transcript. FRAP 10(b)). I understand that unless I have already ordered the transcript, I shall order its preparation at the time required by the Civil Appeals Management Plan, F.R.A.P. and the local rules.

60-A

COPY OF THE WITHIN PAPER
RECEIVED
MAY 15 1975
ATTORNEY GENERAL

COUNSEL'S SIGNATURE	DATE
	May 14 1975

COURT REPORTER ACKNOWLEDGEMENT

To be completed by court reporter. Return one copy to clerk, U.S. Court of Appeals.

DATE ORDER RECEIVED	ESTIMATED COMPLETION DATE	ESTIMATED NUMBER OF PAGES

SIGNATURE OF COURT REPORTER	DATE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

BERNARD FRIED, :

Plaintiff :

-versus- : 74-C-219

ROBERT O. LOWERY, et al., :

Defendants :

----------x

United States Courthouse
Brooklyn, New York

January 31, 1975
10:00 o'clock a.m.

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

DEFENDANT'S MOTION FOR AN ORDER
DISMISSING THE SUPPLEMENTAL
COMPLAINT, ETC.

IRA RUBENSTEIN
ACTING OFFICIAL COURT REPORTER

Appearances:

BERNARD FRIED, Pro Se

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General of the
State of New York

BY: BURTON HERMAN, ESQ.,
Attorney for the Defendants

- - - -

IR:jm

THE COURT: This is a motion by the Attorney General?

MR. HERMAN: Yes, your Honor.

THE COURT: To dismiss as to two Supreme Court Justices and Supreme Court County Clerk?

MR. HERMAN: Yes, yes, your Honor.

THE COURT: Wait a minute. Give him the appearance on behalf of the Attorney General.

MR. HERMAN: Burton Herman, Assistant Attorney General.

MR. FRIED: Bernard Fried, plaintiff pro se.

THE COURT: Now, Mr. Fried, you sit down and let Mr. Herman -- it's his motion, he will argue first and you vacate that so he may use that lectern if he wishes. Then you may argue.

MR. HERMAN: Thank you, your Honor. This is a motion to dismiss an amended complaint initiated under the civil rights action and the complaint itself had previously been dismissed by yourself pursuant to motion by the defendants on the grounds that the Court lacked jurisdiction of the subject matter. The action, and you have a memorandum decision order dated October 27, 1974.

THE COURT: I remember it.

MR. HERMAN: So, I, for the reasons set forth

in your memorandum, I would move to dismiss the amended complaint as well. The amended complaint does not set forth any facts which would make the complaint fall outside the scope of rational and cases set forth in your decision; namely, the two Supreme Court Justices and County Clerk are colored with immunity from suit for acts performed within their official capacity as judges and as Supreme Court judge. And the judicial immunity clearly applies to the complaint and the amended complaint filed here.

They're not subject to suit for alleged acts performed within their judicial office. Additionally, my memorandum of law sets forth other cases which elaborate on that doctrine.

THE COURT: I have little difficulty with the two Justices, the only one I have some doubt about was the County Clerk.

MR. HERMAN: I have --

THE COURT: We've had a number of cases and none of which I have had a chance to read yet. I assume they cover the --

MR. HERMAN: To elaborate as far as the County Clerk is concerned, apart from the doctrine of judicial immunity, I would like to add in addition to that as a basis for this motion, I would also like to

add that there is nothing in the complaint which shows any intent on the part of the County Clerk to deprive Mr. Fried of any of his Constitutional rights.

THE COURT: You mean, there is no allegations of maliciousness?

MR. HERMAN: Or facts which could even be construed as which conclusion of that nature can be drawn; that this was, only a case of a most, of a misplaced file which they informed me has not been misplaced. Assuming complaints was correct it was misplaced. A temporarily misplaced file doesn't amount to any kind of claim under the Civil Rights Act.

THE COURT: If there were allegations of maliciousness or gross negligence or fraud with the doctrine of judicial immunity, apply one to the Justices and two to a County Clerk.

MR. HERMAN: Yes, your Honor. It would even in that case, even when there are such allegations, it's been said that doctrine still applies.

THE COURT: It's my recollection from the State law anyway that that's a fact. I assume the Federal cases are along the same lines.

MR. HERMAN: Yes. I think Peterson vs Wright

or -- I have seen that doctrine in the Federal Courts. I'm not sure whether it's explained or stated in Peterson. In any event, we're not confronted with that here.

THE COURT: Now, what is the situation while I have you on your feet with respect to the remaining defendants? My recollection is you, correct me if I'm wrong, I signed an ex parte order extending their time to answer.

MR. HERMAN: Yes. That's what I heard from talking to the City counsel.

THE COURT: Is the City Corporation counsel, do you know what he proposes to do?

MR. HERMAN: No, your Honor, I don't.

THE COURT: The only three people that the Attorney General is concerned with are those three individuals.

MR. HERMAN: Yes.

THE COURT: All right. Mr. Herman, thank you. Mr. Fried, you understand what the Attorney General says with respect to those three defendants? That there is a doctrine of judicial immunity which applies to Justices and which he says also applies to the Clerk of the Court acting in his official capacity, which renders him not liable to suit.

MR. FRIED: May I answer?

THE COURT: Yes.

MR. FRIED: In my opinion, your Honor, I believe that judicial immunity does not apply in this matter for the reason there was no criminal action before the judges. This is a question --

THE COURT: That doesn't make any difference. The question I direct to you, do you know of any cases, any precedents which hold that the doctrine of judicial immunity does not apply to facts such as you set forth here.

MR. FRIED: Your Honor, I am not a lawyer. I don't know of any precedents and I only know what I have been told from conversations with the other attorneys, and what they have told me was that only in the matter where there is a criminal hearing before the judge the judge has judicial immunity. But when there is a civil action as a matter of fact, where I was -- the petitioner and the plaintiff petitioning for a greivance where my Constitutional rights were infringed upon, they say they can't see anything, any immunity there.

THE COURT: All of those cases that are cited by the Attorney General, several cases none of them People against so-and-so with the exception of

Edwards against People; that's a reversed situation not People against so-and-so or U.S. against so-and-so. Pernell against May, Stamler against Dillon, are all civil cases which --

MR. FRIED: I can only repeat what I know has been told to me. I'm not a lawyer and I haven't been able to make research on that. So, to see whether it's so and I am seeking the aid of the Court to determine for me exactly that. I don't know but your Honor, I do not see as I pointed out previously, I do not seek punitive measures against anybody. I am merely seeking to re-establish my rights, to cleanse the record and to be reinstated to my former position.

THE COURT: I understand what you're seeking, Mr. Fried. You may not be able to lay a suit against Mr. Justice Gold, Mr. Justice Tilleroff, possible not against the County Clerk Goodman. I have some qualms about County Clerk Goodman, but I think the doctrine of judicial immunity applies even in the civil rights action and I'm not sure but I think it does.

MR. FRIED: Would it then be possible for me, your Honor, to request or move the Court to permit me to separate those two defendants from the rest of it? So, the other one will not be dismissed.

THE COURT: The only ones we're concerned with here today are those three defendants.

MR. FRIED: They might use that as a stepping stone since two were dismissed and the other should be also.

THE COURT: Only if as far as this particular ground is concerned, let's assume Mr. Lowery, Commissioner Mr. O'Hagen, Commissioner of the Fire Department, and I'm not quite sure which of those other individuals are administrators or commissioners in the City government, they wouldn't be entitled to that kind of immunity.

MR. FRIED: No.

THE COURT: I don't think they --

MR. FRIED: He's also moving to have it, enter action.

THE COURT: As against his clients?

MR. FRIED: Based on lack of jurisdiction only as against those three clients not against the others.

THE COURT: It's a dismissal on the ground they're judicially immune from suit.

MR. FRIED: The only thing, the way I read the motion, it states, where notice of motion to dismiss supplemental complaints --

THE COURT: As against his three clients.

MR. FRIED: Well, all right, as against the three clients. As you point out, you don't know whether the County Clerk would be included if there -- I'm leaving it all in your hands, your Honor.

THE COURT: I understand that.

MR. FRIED: I'm not a lawyer, I'm merely trying to obtain my rights which have been so clearly denied me. I'm looking for justice here, your Honor which I have been deprived of.

THE COURT: I understand your complaints. You see, the problem, you're putting the Court in now -- with the complaint that I understand, some months ago I warned you to get an attorney to help you on it because we have these, what I'm sure you regard as technical offenses, which a lawyer might be able to work around. I cannot act as your lawyer when you say you're, "putting it all in my hands". That's all well and good. But, I've got to be impartial between you and Mr. Herman her . I've got to treat yc equally and treat you both fairly. I cannot, I say I'm going to represent Mr. Fried work against Mr. Herman; that is not my function.

MR. FRIED: No, your Honor, I expect the impartiality on your part to argue for me. Because

the impartiality --

THE COURT: I am not going to argue.

MR. FRIED: It will prove my point. May I, your Honor at the same time point out one thing here I have an affirmation from my attorney of record at the present time who states plainly that even though he does not want to represent me in the Federal Court, he said there is a way for me, it is his feeling an action in the State Court at the present time based upon Rule 15 of the CTLR, which equivalent of 60B of the Federal Rules of Civil Procedure, USCA.

THE COURT: Why don't you pursue that action and let this one ride?

MR. FRIED: Well, your Honor I'm trying to pursue it from every direction. I'm trying to obtain justice every way I possibly can, your Honor and I have no money and this attorney at the present time knows my conditions. He's making this motion without my paying him and therefore --

THE COURT: My question to you is, why don't you concentrate your effort on that suit?

MR. FRIED: But I am your Honor. I know how far I will get with that in the State Court. I haven't been able to get far in the State Court until now, your Honor.

THE COURT: All right.

MR. FRIED: I haven't any copy of this and I don't know --

THE COURT: I can file it. I didn't make any copy. I'll read it and then I'll give it back to you.

MR. FRIED: I'll make a copy and then I'll give it to your Honor.

THE COURT: I would urge you strongly to persuade Mr. Frankenberg to appear on your behalf in this court but I can't do that.

MR. FRIED: I cannot. He stays, every attorney stays away from it they don't want to undertake this type of a procedure. They just shy away from it. It seems I have overstated my case by including some of the issues in the case instead of just arguing as you pointed out on the res adjudicata, which is the same thing this would be involved in.

THE COURT: Let me ask Mr. Herman a question. Are any of those cases you've cited, Mr. Herman, do any of them involve the civil rights action as such.

MR. HERMAN: Yes, they do involve civil rights actions, your Honor.

THE COURT: The only case I ever had any experience with, involved a suit that was, it was

malicious prosecution action as I recall it. It was followed by a civil rights action but the civil rights action did not include suit against the judge.

But you can't remember ever reading a case on that precise point? I wouldn't think a different rule would apply, but I suppose you can't be sure.

MR. HERMAN: The doctrine of judicial immunity is a common law doctrine and it's an exception to the civil rights acts as far as liability are concerned. So, I think that's what --

THE COURT: We can check that. We'll make sure that we're right on it. All right, gentlemen I'll look at this.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BERNARD FRIED :

Plaintiff :

-against- : 74 C 219

ROBERT LOWERY, et al. :

Defendants :

----------x

225 Cadman Pl. E.
Brooklyn, N.Y.
March 21, 1975

Motion to Dismiss

Before: HON. THOMAS PLATT
District Court Judge

Appearances:

W. BERNARD RICHARD, Corporation Counsel
250 Broadway
New York, N.Y.
Representing Defendants
By: GARY MC MINNIMEE, Esq.
Of Counsel

(At 12:30 p.m., the motion to dismiss was called by the Clerk.)

THE COURT: Bernard Fried versus Robert Lowery, motion on behalf of the defendant to dismiss the amended complaint.

MR. MC MINNIMEE: That's correct.

THE COURT: Mr. Fried?

(No response was made)

No appearance on behalf of the plaintiff

MR. MC MINNIMEE: Your Honor, if you will notice, certain defendants were not served and other defendants we have been unable to contact.

THE COURT: The complaint is dismissed.

(At 12:45 p.m., the appearance of Bernard Fried, the plaintiff, was noted)

MR. FRIED: I must apologize to the Court.

THE COURT: The motion to dismiss was granted.

MR. FRIED: I have been here all day.

THE COURT: It was on and there was no appearance and the motion was granted.

MR. FRIED: Your Honor, the last time there there was no appearance by defendants -

THE COURT: The motion was granted.

MR. FRIED: May I ask your Honor to please recall that and listen to my plea?

THE COURT: No. The motion is granted. I have been here all morning.

MR. FRIED: I know and I apologize to the Court. Can I ask for a re-hearing? I had an appointment with this gentleman here to go to lunch with him for one o'clock.

Right over the name, it says two o'clock and I thought it was on for two o'clock.

THE COURT: The calendar says eleven.

MR. FRIED: Right there it says. I misread that.

THE COURT: It said 11:00 a.m.

MR. FRIED: May I show you?

THE COURT: No. The motion is granted.

MR. FRIED: What other recourse can I have? I have nothing else. I feel there's something wrong. Thank you, your Honor. I'm sorry.

THE COURT: So am I.

MR. FRIED: I can't understand it.

C E R T I F I C A T E

The foregoing 3 pages is a true and accurate transcript of proceedings in the matter of Bernard Fried v. Robert Lowery, et al. 74 C 219 on March 21, 1975 at the United States District Court for the Eastern District of New York as transcribed from my shorthand record.

I am not related to any of the parties in said action and have no financial interest in said action and acted solely in the capacity of acting court reporter.

Joseph L Benedetto
Acting Court Reporter

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

BERNARD FRIED,

Plaintiff-appellant

- against -

ROBERT O. LOWERY, et al.,

75 - 7289

Defendants-appellees

----------X

Service of a copy of the appeal herein, is hereby acknowledged, and admitted.